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Working Group on Indigenous Populations
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STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS PEOPLE: THE CONCEPT OF "INDIGENOUS PEOPLES"

Information received from indigenous peoples' organizations

Addendum

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION

[Original: ENGLISH]
[11 June 1996]

A definition of "indigenous peoples"?

Introduction

1. The Aboriginal and Torres Strait Islander Commission, an indigenous organization in consultative status with the Economic and Social Council, believes that certain definitional issues, particularly those relating to the meaning of "indigenous peoples", in the draft declaration on the rights of indigenous peoples and the proposed permanent forum for indigenous peoples, are matters which should be determined by the world's indigenous peoples themselves.

Is there a need for a definition of "indigenous peoples"?

2. Deciding upon an unequivocal definition of "indigenous peoples" as a prerequisite for advancing the work of the Working Group on Indigenous Populations on the draft declaration is unnecessary. Nor should the present lack of a watertight definition be an impediment to the establishment and operation of a permanent forum. As indicated at the first session of the working group of the Commission on Human Rights held in Geneva in November/December 1995, and elsewhere:

Central concepts in international human rights instruments are often not defined;

The United Nations generally refrains from attempting tight definitions, which may limit the flexibility of Governments and peoples in applying relevant instruments to their own national circumstances;

No definition of "minorities" was arrived at for the work of the United Nations on minorities, although Commission on Human Rights resolution 1984/62 sought a definition;

Other instruments, such as the Rio Declaration - Agenda 21, refer to indigenous peoples' participation in environmental issues, without defining those peoples.

3. Early settlement of definitional terms may well exclude significant groups from enjoyment of such rights as may be accepted in the draft declaration. Clearly there is no need to reach a precipitate determination of the meaning of "indigenous peoples" in an abstract definition.

4. It is sufficient to found the role, legitimacy and mandate for the continued development of the draft declaration by the working group of the Commission on Human Rights, and for the establishment of a permanent forum to deal with the interests of all the world's indigenous peoples, that peoples exist who are unequivocally acknowledged as indigenous. Some are acknowledged as such by their own sovereign States, and attend United Nations forums as indigenous representatives, either within State delegations, or as indigenous NGOs. Others are invited to attend as indigenous parties by the United Nations. Resolutions of the Commission on Human Rights clearly acknowledge their existence, without resort to a definition, and endorse the legitimacy of their continued participation in its work.

Recognition of "indigenous peoples"

5. Two steps hitherto were involved in recognition of the legal status of an "indigenous people".

Self-identification;

Recognition by an international sovereign entity, or institution.

6. Various States have used domestic definitions for indigenous groups, referring to them by their own distinctive names or tribes. Identification was also settled under international law when paramount States entered into treaties at settlement, often acknowledging them as "dependent nations", as in the United States of America or Canada, or at the conclusion of wars, or for the maintenance of borders. As domestic courts and international institutions have acknowledged those arrangements, indigenous identity is widely acknowledged.

Australian domestic definitions

7. "Aboriginal" is a technical term applied to the indigenous peoples of Australia, and other lands, and means "from the beginning". In effect, it acknowledges such peoples as the "first peoples" of any particular region or place. The term "autochthones" also means "people originating with the land", and articles of the draft declaration attempt to restore significance and vitality to these concepts.

8. Australia has not committed itself with finality to any conclusive definition of "indigenous peoples" in domestic or international law. Domestic legislation works basically to broad pragmatic formulas which aim at conferring, rather than limiting, individual rights and entitlements. Of two alternative definitions the more interesting, from the High Court of Australia, is found in Commonwealth of Australia and Anor. v. State of Tasmania (1983) 46 ALR 625 at 817. It states:

> "By 'Aboriginal Australian' I mean ... a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aborigine." (Dean J.)

9. These criteria, which allow indigenous peoples to set the standards for self-identification and recognition of those who are indigenous, reflect the continuing practice of many sovereign jurisdictions, and accord with principles of international law. They are also found in the 1983 Cobo definition.

The problem of an all-inclusive international definition

10. In searching for suitable meanings in international law for "indigenous peoples", both words must be addressed, i.e., the indicia which distinguish "peoples", and a legal meaning for "indigenous". Ample working definitions exist to deal with both issues. The International Meeting of Experts' Final Report on the Further Study of the Rights of Peoples (UNESCO: SNS - 89/CONF.602/7) 1990, offered a provisional working definition for:

> "A people for the [purpose of the] rights of people in international law, including the right to self-determination".

11. The Working Group has used, and should continue to use, the Cobo working definition for "indigenous peoples". The Cobo formula and ILO Convention No. 169 concerning Indigenous and Tribal Peoples (1989) definition both acknowledge self-identification and self-recognition as essential aspects in

defining indigenous peoples. Both models are useful, and despite the fact that ILO Convention No. 169, at article 1.3 has the caveat: "The use of the term 'peoples' in this Convention shall not be construed as having any implication regarding the rights which may attach to the term under international law", this is severable for a working definition and other purposes. It is also clear from the drafting history of ILO Convention No. 169, that that disclaimer was not part of the original version, but was a subsequent amendment to make the Convention more universally acceptable.

Continued use of the word "peoples"

12. There should be no rational objection to the use of "peoples", either for the draft declaration, or the permanent forum. The word "peoples" in conjunction with "indigenous" already features in an existing international instrument, ILO Convention No. 169. The words can be read conjunctively as including peoples who are both tribal and indigenous, or disjunctively, as a convention relating to "tribal peoples" and to "indigenous peoples". The proviso at article 1.3 clearly indicates that the second reading is intended, otherwise there would have been no purpose in adding the proviso. As article 3 of the draft declaration proposes self-determination for indigenous peoples, the use of "peoples" in the declaration's title cannot be objected to as intensifying that claim.

Elements in defining "indigenous peoples"

13. Any definition should address recognition of:

The right of indigenous peoples to self-identify as such;

The meaning implicit in the terms "indigenous" and "aboriginal peoples";

The consequent rights of primogeniture as "first peoples";

The rights which this implies in relation to land, self-determination and culture;

The right to accept others into groups classed as indigenous or aboriginal; and

The right to determine finally the indicia and definition for "indigenous peoples".

14. In summary:

Historically, central concepts in human rights instruments are often not defined;

The customary right, sanctioned by State practice and in international law, for indigenous peoples, or indeed for any peoples, to determine the criteria for their own identity should be defended; and

Premature proposals to reach conclusive definitions at this stage should be resisted.